UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOAN HANGARTER, Plaintiff, v. THE PAUL REVERE LIFE INSURANCE CO., UNUMPROVIDENT CORPORATION, et al., Defendants.	)	Case No. C 99-5286 JL (ADR) ORDER GRANTING LEAVE TO AMEND

Plaintiff's motion for leave to file a second amended complaint was heard on September 5, 2001. Ray Bourhis appeared on behalf of plaintiff. Horace Green appeared on behalf of defendants. The court grants leave to amend for the following reasons.

BACKGROUND

On or about December 1, 1989, Plaintiff Dr. Joan Hangarter, a chiropractor, ("Plaintiff") purchased a disability insurance policy from Defendant, Paul Revere Insurance Company ("Defendant"), a subsidiary of UnumProvident Corporation ("UnumProvident")(collectively "Defendants" or "Provident"). The Policy provided that Defendants would pay benefits to Plaintiff if (1) illness or injury prevented her from

working as a chiropractor, (2) she could not engage in other gainful employment, and (3) she was under the regular and personal care of a physician. (Ex. R to Memorandum of Points and Authorities).

In April 1997, Plaintiff began experiencing tenderness in her fingers and severe pain in her neck, elbow, and arm. *See Complaint* at 3:23-26. The pain became so unbearable that in July 1997, she ceased working as a chiropractor and applied for disability benefits pursuant to her policy. *See id.* at 3:26-28. In December 1997, Defendant commenced paying Plaintiff retroactive and current disability benefits. *See id.* at 4:1-3. On March 11, 1999, Defendant sent Plaintiff to Dr. Aubrey Swartz for a physical examination. Contrary to Plaintiff's own physicians' findings and a magnetic resonance image ("MRI") of her cervical spine, Dr. Swartz found no objective signs of disability. Accordingly, on May 21, 1999, Defendants terminated Plaintiff's disability benefits, finding that she had recovered sufficiently to be able to perform her duties as a chiropractor.

PROCEDURAL HISTORY

On November 8, 1999. Plaintiff filed her complaint in the Superior Court of Alameda County. Defendants removed the case to federal court on December 15, 1999. On February 11, 2000, the court granted defendants' motion to dismiss the complaint with leave to amend. The amended complaint was filed April 11. The time to answer was extended by the court to May 2. A settlement conference was held on June 29, 2000. On January 3, 2001, the court denied defendants' motion for partial summary judgment, finding that plaintiff's disability policy was not part of an ERISA employee benefit plan. On July 11, 2001 the court heard defendants' motion for summary judgment on plaintiff's causes of action for bad faith, fraud and punitive damages. On July 20, defendants filed a statement regarding a recent decision and on August 2, the court issued an order permitting briefing. Defendants filed another statement on August 9. Plaintiff responded on August 20. The motion for summary judgment is under submission at the time of this order.

PROPOSED AMENDMENT TO THE COMPLAINT

Plaintiff proposes to add a First Cause of Action for violation of California Business and Professions Code §17200, the Unfair Business Practices Act. On behalf of the general public, and of law-abiding insurance companies who have suffered unfair competition, seeking no damages on her own behalf, plaintiff asks the court to order:

1) injunctive relief, in the form of an injunction against defendants' continuing to engage in the unlawful conduct;

2) that defendants be ordered to re-open claims filed by its insureds with "own occupation" disability policies where the complained-of practices were employed, with notice to the insureds and review, reprocessing and reevaluation of their claims;

3) restoration of all monies illegally obtained in the form of premiums for these policies;

4) any equitable relief deemed appropriate by the court;

5) reasonable attorneys' fees.

The Second Cause of Action is for Breach of Contract against Paul Revere, UnumProvident and Doe Defendants. Plaintiff seeks damages of $8100 per month in unpaid benefits.

The Third Cause of Action is for Breach of the Covenant of Good Faith and Fair Dealing against Paul Revere, UnumProvident and Doe Defendants. Plaintiff seeks damages of $8100 per month in unpaid benefits and punitive damages.

The Fourth Cause of Action is for Intentional Misrepresentation against Paul Revere, UnumProvident and Doe Defendants. Plaintiff seeks damages of $8100 per month in unpaid benefits and punitive damages.

ANALYSIS

Federal Rule of Civil Procedure 15(a) provides that a party may amend its complaint once "as a matter of course" before a responsive pleading is served, after that the "party may amend the party's pleading only by leave of court or by written

consent of the adverse party and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). Thus "after a brief period in which a party may amend as of right," leave to amend lies "within the sound discretion of the trial court." *U.S. v. Webb*, 655 F.2d 977, 979 (9th Cir.1981).

In exercising its discretion "a court must be guided by the underlying purpose of Rule 15--to facilitate decision on the merits rather than on the pleadings or technicalities." Webb, 655 F.2d at 979. The Ninth Circuit has noted "on several occasions ... that the 'Supreme Court has instructed the lower federal courts to heed carefully the command of Rule 15(a), Fed.R.Civ.P., by freely granting leave to amend when justice so requires.' " *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765 (9th Cir.1986) (*quoting Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir.1973) (citations omitted).

Thus "[r]ule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.' " *Webb*, 655 F.2d at 979 (*citing Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406 (9th Cir.1960) (per curiam)). This liberality in granting leave to amend is not dependent on whether the amendment will add causes of action or parties. It is, however, subject to the qualification that amendment of the complaint does not cause the opposing party undue prejudice, *Acri v. International Ass'n of Machinists*, 781 F.2d 1393, 1398-99 (9th Cir.), cert. denied, 479 U.S. 816 (1986); *U.S. v. City of Twin Falls, Idaho*, 806 F.2d 862, 876 (9th Cir.1986), is not sought in bad faith, *Howey*, 481 F.2d at 1190-91, and does not constitute an exercise in futility. *Klamath*, 701 F. 2d at 1293. These factors, however, are not of equal weight in that delay, by itself, is insufficient to justify denial of leave to amend. *Webb*, 655 F.2d at 980; *Hurn v. Retirement Fund Trust of Plumbing, Heating and Piping Industry of Southern California*, 648 F.2d 1252, 1254 (9th Cir.1981).

Another factor occasionally considered when reviewing the denial of a motion for leave to amend is whether the plaintiff has previously amended the complaint. In *Mir v. Fosburg*, 646 F.2d 342 (9th Cir.1980), the plaintiff had amended his complaint once.

Both the original complaint and the amended one were dismissed for lack of jurisdiction. When the plaintiff requested leave to file a second amended complaint, the district court denied the motion. In affirming the denial, the court held that a district court's discretion over amendments is especially broad "where the court has already given a plaintiff one or more opportunities to amend his complaint...." Id. at 347; *see Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1438 (9th Cir.1986), cert. denied, 479 U.S. 1064 (1987); *Mooney v. Vitolo*, 435 F.2d 838, 839 (2d Cir.1970) (per curiam), *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

APPLICATION TO THE CASE AT BAR

This court in the case at bar has weighed the following factors: bad faith, undue delay, prejudice to defendants and futility of amendment, as well as plaintiff's previous amendment. Plaintiff amended her complaint once, to dismiss a defendant, Patricia Meyers. Defendants had moved to dismiss on the basis that Ms. Meyers' presence in the case would destroy diversity, and that therefore the case should be remanded to state court. Plaintiff dismissed Ms. Meyers and the matter proceeded in this court.

There is no evidence of bad faith by the plaintiff.

Undue delay is not an issue, since new evidence proffered that Paul Revere adopted the policies of Provident, and that employees at Bay Brook Medical Group on Provident's behalf altered and destroyed medical documents, was not available at the time of filing of the original complaint in this case, and in fact was only uncovered within the last month. Plaintiff claims that there would be no delay of the trial since no more discovery is necessary besides the deposition of Mr. Mohney, which is already scheduled to be taken this month. Defendants claim that plaintiff should have amended her complaint sooner, since she had access to the same documents upon which she bases her amendment and since defendants will need to take additional discovery and prepare to defend against a whole new line of attack.

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Plaintiff seeks to add a cause of action for unfair business practices in light of deposition testimony taken in July 2001 in a state court case, *United Policyholders, et. al. v Provident et al.*, Alameda County Superior Court, Case No. 815688-2. (See Memorandum of Points and Authorities and Declaration of Alice Wolfson in Support of Plaintiff's Motion to Amend.) These exhibits tend to show that when Provident acquired Paul Revere, as part of the transition, Paul Revere employees became Provident employees and implemented Provident's policies for handling claims, as complained of in this lawsuit: targeting certain types of claims for termination. (See Ex. Q to Confidential declaration of Alice Wolfson - Transition Plan). Defendants developed risk profiles of targeted claims and claimants based on the following factors:

1) Higher amounts of income of insured;

2) Existence of residual or COLA riders;

3) Longer benefit period;

4) Shorter elimination period;

5) 1983 to 1989 issue;

6) California and Florida;

7) Certain occupations.

(Ex. H to Memorandum of Points and Authorities).

Recently, for the first time, employees of a Paul Revere subcontractor, Bay Brook Medical Group, testified about their practice of reviewing the medical reports from examining physicians, returning them to the physicians for revisions, and then destroying the original reports once the revised reports were drafted to the company's satisfaction. Plaintiff alleges that this practice in itself violates California law. (See Exhibits A through D to Declaration of Alice Wolfson).

Defendants oppose amendment of the complaint on grounds it would be futile, since they contend there is no private right of action under the Unfair Insurance Practice Act ("UIPA"), Insurance Code, §790 *et seq.*, and plaintiff is attempting to use a

claim under the Unfair Business Practices Act, (Business and Professions Code §17200), to make an end run around this prohibition. Defendants claim that plaintiff's allegations in support of this cause of action are untrue, the injunctive relief sought by plaintiff is not available as a matter of law, and, therefore, leave to amend should not be granted.

Defendants characterize paragraphs 19 through 25 of the second proposed amended complaint as "nothing more than history" and "plaintiff's attempt to recount defendant Provident's corporate financial history from 1983 to 1994 as it related to its disability insurance business during that period of time." Defendants assert that all along in this case plaintiff has offered this "mere history" as evidence of defendants' financial motivation to target certain expensive claims for termination. Defendants' own documents show that it did indeed target certain categories of claims for closer scrutiny, for instance doctors in Florida and California. (See Exs. E, F, G and H to Plaintiff's Memorandum of Points and Authorities).

Paragraphs 26 through 28 of the proposed amended complaint allege that Provident's Senior Vice President of Claims, Ralph Mohney, on behalf of Provident itself, implemented various initiatives in order to unfairly deny the claims of its insureds. Plaintiffs alleged such practices as keeping information out of the written reports if it could prove damaging to defendants in the event of legal action (See *Id.,* Exs. I, J and K). Defendants assert that these allegations are untrue, and that, therefore, these paragraphs should not be added to plaintiff's complaint.

Plaintiff contends that Provident contractor Bay Brook Medical Group chose physicians who would find claimants to be not disabled, failed to instruct physicians regarding the appropriate definitions of disability, and destroyed medical records. (See *Id.*, Ex. M).

In fact, the July 2001 deposition testimony in another case of four current and

former employees of Provident subcontractor Bay Brook Medical Group,[1] excerpted in Exs. A, B, C and D to Alice Wolfson's Declaration, support the allegations that employees of Bay Brook complained of being required to alter medical reports (Ex. A); and that it was standard procedure for them to shred original medical reports following independent medical examinations and to retain only the final version written after the insurance company personnel had reviewed the original report and referred it back to the examining physician for revisions (Exs. B and D).

This court should not make preliminary factual findings in order to cut plaintiff off at the pleading stage. The facts in this case are for the jury. The denials by defendants' employees, Joe Sullivan, Sandra Fryc and Mr. Mohney -- that Provident targeted certain claims for termination – does not preclude plaintiff from adding a claim for unfair business practices. Following the Defendants' logic, there wouldn't ever be trials; a simple denial would end the matter.

Defendants cite the California case of *Safeco Ins. Co. v. Superior Court*, 216 Cal.App.3d 1491, 1494 (1990) and its interpretation of *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 304 (1988), to foreclose a cause of action under §17200 as a sham substitute for a private right of action for violations of Insurance Code §790 *et seq.* Defendants contend there is an absolute bar to private enforcement of this section. In *Safeco* the court held that a motorcyclist who settled with an insured driver after an accident could not bring a private cause of action against the insurance company for failure to pay premiums. The *Safeco* opinion, however, is extremely brief, conclusory and involves a third-party lawsuit by an injured person against the insurer of the person who injured him. These factors distinguish it from the case at bar, which involves a suit by the insured against her own insurance company.

In *Moradi-Shalal,* both the facts and the applicable law are distinguishable. That case involved a third-party action brought by an injured person, who first settled her

[1] Bay Brook Medical Group contracted with Provident to provide physicians to perform independent medical examinations on Provident policyholders who filed claims.

case against the driver and then sued the insurance company. The court decided only that §790.09 of the UIPA did not provide a private right of action against the insurer for violation of the UIPA. The court did permit common law causes of action in tort but did not consider the availability of an action under §17200 of the Bus. & Prof. Code.

Defendants also cite the case of *Stop Youth Addiction, Inc. v Lucky Stores, Inc.*, 17 Cal.4th 553, 556 (1998), for the proposition that there is no cause of action available under §17200 if the underlying statute does not authorize a private right of action. However, in a lengthy and well-reasoned opinion, the court directly contradicts defendant's position. In that case, a nonprofit corporation sued retailers for selling cigarettes to minors in violation of California Penal Code §308, which does not authorize a private cause of action. The trial court sustained the retailer's demurrer, the court of appeal reversed and the California Supreme Court affirmed.

The court, reasoned as follows: (1) the nonprofit corporation had standing under the Unfair Competition Law ("UCL") to bring a private action, although Penal Code section 308 provision which was a predicate for the UCL action did not provide a private right of action; (2) private-party standing under the UCL was not impliedly repealed by the Penal Code provision prohibiting tobacco sales to minors or by the Stop Tobacco Access to Kids Enforcement (STAKE) Act; and (3) a private action did not violate public policy by putting prosecutorial discretion within the control of an interested party or by diminishing the enforcement responsibilities of the Department of Health Services (DHS) under the STAKE Act.)

Thus, in a much more detailed and thoughtful decision, the California Supreme Court has allowed a private right of action under §17200, even if the underlying statute does not expressly authorize it, as long as the statute does not explicitly bar it.

The Unfair Insurance Practices Act ("UIPA"), lists a number of prohibited acts at section 790.03 and the remedies at section 790.09.

A partial list of prohibited acts which have been complained of in the case at bar, includes the following:

"(h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:

(1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.

(4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.

(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

(13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.

Cal. Insurance Code §790.03

Contrary to the assertions of defendants, the remedies for violating any of the above provisions are not limited to administrative action, as stated in the plain language of §790.09 itself:

No order to cease and desist issued under this article directed to any person or subsequent administrative or judicial proceeding to enforce the same shall in any way relieve or absolve such person from any administrative action against the license or certificate of such person, civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive.

Cal. Insurance Code §790.09

Consequently, in accordance with the court's reasoning in *Stop Youth Addiction*, civil liability is expressly reserved in the insurance statute which plaintiff claims defendants have violated and, a private cause of action is available to her under §17200 for any alleged unfair business practices by defendants.

The holding of the California Supreme Court in *Stop Youth Addiction* has also been adopted by the U.S. Court of Appeals for the Ninth Circuit, which held that a private right of action for violation of an insurance regulation is available in federal court

under Cal. Business and Professions Code §17200. In *Chabner v United of Omaha*, 225 F.3d 1042 (9th Cir. 2000), plaintiff sued for violation of both the Americans with Disabilities Act and California Insurance Code § 10144, often an insurance company charged him nearly double the usual life insurance premium on the basis of a medical condition which would actuarially shorten his life by four years.

The court held that he could also bring a cause of action for violation of Business & Professions Code §17200:

> Chabner, however, also claimed violations of California Business and Professions Code section 17200. Section 17200 is part of the Unfair Competition Law, Cal. Bus. & Prof.Code 17200--17209, and provides, in relevant part, that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof.Code 17200
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> Private causes of action for violations of Business and Professions Code section 17200 are authorized by Business and Professions Code section 17204. See Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal.4th 553, 71 Cal.Rptr.2d 731, 950 P.2d 1086, 1089 (1998). The district court held that Insurance Code section 10144 may be used to define the contours of a private cause of action under Business and Professions Code section 17200. We agree.
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> The California Supreme Court has held that section 17200 "defines 'unfair competition' very broadly, to include 'anything that can properly be called a business practice and that at the same time is forbidden by law.' " Farmers Ins. Exch. v. Superior Court, 2 Cal.4th 377, 6 Cal.Rptr.2d 487, 826 P.2d 730, 742 (1992) (internal quotation marks omitted) (quoting Barquis v. Merchants Collection Ass'n, 7 Cal.3d 94, 101 Cal.Rptr. 745, 496 P.2d 817, 830 (1972)). "By proscribing 'any unlawful' business practice, section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527, 539-40 (1999) (internal quotation marks omitted). It does not matter whether the underlying statute also provides for a private cause of action; section 17200 can form the basis for a private cause of action even if the predicate statute does not. See Stop Youth Addiction, 71 Cal.Rptr.2d 731, 950 P.2d at 1091.
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> There are limits on the causes of action that can be maintained under section 17200. A court may not allow a plaintiff to "plead around an absolute bar to relief simply by recasting the cause of action as one for unfair competition." The limit is rather narrow, however. "To forestall an action under [section 17200], another provision must actually 'bar' the action or clearly permit the conduct." Cel-Tech Communications, 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d at 541 (internal quotation marks omitted).

Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1049.

In light of the decisions of the California Supreme Court in *Stop Youth Addiction*

and the Ninth Circuit in *Chabner* a cause of action for violations of §790.09 of the UIPA may be asserted under §17200 of the Unfair Competition Law by plaintiff in the case at bar. Section 790.09 expressly provides that an administrative action does not immunize a defendant from either civil or criminal liability. Consequently, this amendment to plaintiff's complaint to add a cause of action under the UCL is not futile.

Parenthetically, in response to Defendants' assertion that injunctive relief is not available to plaintiff in this case pursuant to §17200, this court reiterates its previous ruling in another case: as a matter of law, California's Bus. & Prof. Code §17200 provides for both disgorgement of profits and injunctive relief. *Irwin v. Mascott*,112 F.Supp.2d 937 (N.D.Cal.2000).

CONCLUSION AND ORDER

Plaintiff has amended her complaint once to dismiss a non-diverse defendant. She has not unduly delayed moving for leave to amend to add this cause of action, because the amendment is based on information which was revealed in depositions taken one month ago in a state court case. That evidence tends to show that Paul Revere adopted Provident's claims handling policies as part of the transition when it was acquired by Provident, and that Provident and Bay Brook Medical Group employees acting on Provident's behalf admit to such practices as destruction of the original medical reports from examining physicians.

Defendants make a weak showing of prejudice. The court finds it hard to believe that defendants have never confronted this type of cause of action before and are unprepared to meet it. The futility argument fails because it is based either on incorrect interpretation of the law or contentions of fact that plaintiff's allegations are untrue. The jury should decide the facts in this case.

Accordingly, Plaintiff's motion for leave to amend her complaint to add a cause of action for violation of Business and Professions Code §17200) is granted. This order resolves Document Number 119 in the court's docket.

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IT IS SO ORDERED

Date: September 21, 2001

James Larson
United States Magistrate Judge